VIRGINIA LAW REGISTER

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Evidence: Removal of Disability Broadening the Rules of Exclusion.

Our Code Revisors, very wisely we think, have broadened the rules of evidence as to the admission of testimony of persons heretofore excluded because of the death of parties, etc., etc.

The Supreme Court of the United States in a very recent case, *Rosen* v. *United States* (Advance Opinions, No. 5, Feb. 1, 1918, Lawyer's Co-op. Pub. Co., p. 163), overrule the case of United States *v.* Reid, 12 How. 361, and admitted the evidence of a confessed forger. In this case—an indictment for stealing from a letter box—Broder, who had been previously convicted of forgery, was allowed to testify. Objection was made by the accused to the admission of Broder's testimony, on the ground that he had been so convicted and as ground for that objection counsel relied upon *United States* v. *Reid, supra.*

> "In that case it was held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 [1 Stat. at L. 73, chap. 20], was passed, and the argument in this case is that by the common law as it was administered in New York in 1789, a person found guilty of forgery and sentenced was thereby rendered incompetent as a witness until pardoned, and that, therefore, the objection to Broder should have been sustained."

But the Court in overruling the objection said:

> "While the decision in United States *v.* Reid, supra, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in Logan *v.* United States, 144 U. S. 263-301, 36 L. ed. 429-442, 12 Sup. Ct. Rep. 617, and in Benson *v.* United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60.

"The Benson Case differed from the Reid Case only in that, in the former, the witness whose competency was objected to was called by the government, while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case, but it was rejected in the other, and both judgments were affirmed by this court; however, forty years had intervened between the two trials. In the Benson Case, decided in 1891, this court, after determining that the Reid Case was not decisive of it, proceeded to examine the question then before it 'in the light of general authority and of sound reason;' and, after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change 'which was wrought partially by legislation and partially by judicial construction,' and how 'the merely technical barriers which excluded witnesses from the stand had been removed,' proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

"Accepting as we do the authority of the latter, the Benson Case, rather than that of the earlier decision, we shall dispose of the first question in this case, 'in the light of general authority and of sound reason.'

"In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the Benson Case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (Rev. Stat. § 5392, Comp. Stat. 1916, § 10,295) by the enactment of the Federal Criminal Code in 1909 [35 Stat. at L. 1088, chap. 321, Comp. Stat. 1916, § 10,165] with this provision omitted and § 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabil-

ities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

Van Devanter and McReynolds, J. J., dissented on the ground that so much of the opinion as departs from the rule settled in *United States* v. *Reid* and *Logan* v. *United States,* was wrong, these cases in their opinion having been in no way modified by what was actually decided in Benson *v.* United States.

Perjury is in this State we believe the only crime which disqualifies a witness after conviction and punishment and we would regret to see that disqualification removed. But the tendency of the age is undoubtedly to remove all disqualifications and let the jury pass upon the credibility of the witness. We can not say that it is unwise.

Spendthrift Trusts: Bankruptcy: What Property Passes to The Trustee in Bankruptcy.

Much ingenuity has been exercised in the attempt to make a valid spendthrift trust: The Courts, as a general rule have found a means to get at the property attempted to be safeguarded for the "spendthrift," and have applied it to his debts.

A testator in the state of New York has, however, successfully found a way, through the medium of the Bankruptcy Act, to make a fund available for his son and non-available for his creditors. The testator in this case authorized a trustee to pay over to his son the principal of a trust fund upon a statement by the son that "he is financially solvent and able to pay his just debts and liabilities from re-

sources other than the principal of this trust fund." The young man had contracted a nice bit of debts and his creditors were clamoring for the money.

He promptly went in bankruptcy and was in due time discharged. The testamentary trustee thereupon in pursuance of a decree of the Surrogate's Court paid the trust fund over to him. Thereupon the estate of the bankrupt was reopened and the trustee in bankruptcy brought an action to reach the fund. But the Court held and the Supreme Court of the United States affirmed its decision, that the right to the fund did not pass to the trustee in bankruptcy under Sec. 70-a (5) of the Bankruptcy Act and dismissed the complaint. *Hull* v. *Farmers' Loan & Trust Co.,* U. S. S. C. Advance Opinion January, 1918.

Presumption of Good Character—Evidence of Innocence.

We so often hear it said at the Bar that every criminal is presumed to be of good character, that a great many lawyers and judges really think this is established law. Indeed the Courts have repeatedly instructed juries that the accused was presumed to be innocent of the charge until his guilt was established beyond a reasonable doubt and that the presumption followed him throughout the trial until so overcome.

The Federal Courts in many of the Circuits have given such an instruction and in the case of *Greer* v. *United States,* Supreme Court Advance Sheets 1918, No. 6, p. 228, the lower Court gave such an instruction and the Circuit Court of Appeals sustained it.

That this instruction is in accordance with numerous Federal cases, State cases and Text Books the Supreme Court of the United States, Holmes, J., delivering the opinion in the case *supra,* admits. But as other Circuit Courts of Appeal have taken a different view. *Mullen* v. *United States.* 46 C. C. A. 22; *Garst* v. *United States,* 103 C. C. A. 469, and the question has been widely discussed in numerous other cases and text books, he deems it necessary that the Supreme Court should settle the question.

But in our humble judgment he does not. What he does settle and what the lower Court settled is that the accused is not "presumed to be a person of good character." A very different thing

from being "presumed to be innocent." There can be no question that this is unquestioned law—i. e., that every man is presumed to be innocent until he is proven guilty beyond a reasonable doubt. But that he is presumed to be of good character is not correct.

Justice Holmes well says:

> "Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the government would be entitled to put in evidence whether the prisoner did so or not. As the government cannot put in evidence except to answer evidence introduced by the defense, the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. Addison *v.* People, 193 Ill. 405, 419, 62 N. E. 235.
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> "Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners (McNally, Ev. 320), which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that, by common experience, the character of most people indicted by a grand jury is good."

That this is a correct statement of the rule no one can question and we hope the members of the profession and the Courts will remember it, even in the heat of argument.

Rules of Evidence Not Conclusive upon the Courts.

In the leading cases referred to in our Editorial above it was argued that the Court was bound by the rules of evidence. But the Court referring to *Rosen* v. *United States* again holds that these rules are not conclusive and are in no way conclusive.

Witnesses—Character—Credibility—Impeachment.

And whilst we are upon questions of character, it may not be without interest to allude to the decision of our Supreme Court of Appeals in the case of *Allen* v. *Commonwealth* decided January 24th, 1918. In an attempt to impeach a witness a question was asked him as to a transaction in which he attempted to have a bill for repairs to his buggy doubled in order that he might collect from the party who injured it, twice what he paid for repairs.

The Commonwealth objected to the question and the objection was sustained. In affirming the lower Court our Supreme Court said:

> "This is a question about which there has been great contrariety of decision in the English and American courts. The doctrine most generally accepted now is that such a question on cross-examination as to irrelevant collateral matters tending to show immoral character, affecting the credibility of the witness under cross-examination, should be left to the discretion of the court in the particular case. It is everywhere settled that the cross-examiner who asks such a question is bound by the witness' answer and cannot introduce evidence to contradict him.
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> "In 40 Cyc. 2569-70, the modern authorities are collected. Among other things, it is there said: 'Neither should the door be thrown open so wide for impeaching evidence as to allow questions to be asked upon the pretense that the object is impeachment when there is no reasonable ground to expect favorable answers, or to be able to prove by direct evidence that the unfavorable ones are false and the sole tendency, if not the purpose, is to create suspicion in the minds of the jury.'
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> "In this State it may be regarded as settled that such questions cannot be asked. In *Uhl's Case,* 6 Gratt. (47 Va.) 706, it

was held that the record of conviction of a witness of petty larceny, in another State, is not admissible to impeach the veracity of the witness. In *Langhorne's Case*, 76 Va. 1021, the court says: 'It is competent, in order to discredit a witness, to offer evidence attacking his character for truth and veracity. Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose. 1 Whart. Law of Ev., sec. 562. No question respecting any fact irrelevant to the issue can be put to a witness on cross-examination for the mere purpose of impeaching his credit by contradicting him. And if any such question be inadvertently put and answered, the answer of the witness will be conclusive. 2 Taylor on Evidence, sec. 1435.' The same doctrine is enunciated by Greenleaf. He says, 'In general, the rule is that upon examination to try the credit of the witness only general questions can be put; and he cannot be asked as to any collateral independent fact merely with a view to contradict him afterwards by calling another witness. And (he says) only general questions can be put. Greenleaf on Evidence, 455.' In *Cutchin* v. *Roanoke*, 113 Va. 452, *Uhl's Case, supra,* and *Langhorne's Case, supra,* are approved.

"The test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether or not the cross-examining party be entitled to prove it in support of his case. *State* v. *Goodwin*, 32 W. Va. 177, 9 S. E. 85; *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 76."

This decision is peculiarly valuable in view of the great laxity which is permitted in our Courts in allowing cross-examinations to go to lengths which consume time, obscure the issue and tend to confuse both the Court and the jury.

Deeds of Trust. Substitution of Trustees.

Our Supreme Court of Appeals in the case of *Abrahams* v. *Ball*, etc., has rendered a decision of much importance and of first intention in this State. It is upon the question of the appointment of a substituted trustee and its importance grows not only from the fact that it enters fully into the whole subject but settles the question as to the recordation of the fact of such a substitution in that portion of counties which has been subsequently incorporated into a city.

As this applies to a good many of the present cities of the Commonwealth it is fortunate that we have the decision at such an early date. The material facts of the case are, that a deed of trust was executed and recorded in the County of Prince George in March, 1916. In July, 1916, the City of Hopewell was incorporated and the land conveyed by said deed of trust was incorporated as a part of the City of Hopewell. The deed of trust, which had previously been recorded in Prince George, was then recorded in the Corporation Court of Hopewell, which was unnecessary but which we think was a very wise act on the part of those interested. A part of the land involved was subsequently to the date of the deed of trust conveyed to one Salisbury, and this deed was admitted to record in the clerk's office of the circuit court of Prince George County. Notice of the motion was given to all parties interested, except to Mollie Salisbury, and to the trustee in the original deed of trust, who had left the Commonwealth and could not be found. The first question was, Did the corporation court of Hopewell have jurisdiction under Section 3419 of the Code? It seems to us there could have been very little question in view of the language of this section, which provides that the notice "might be given in the circuit court of the county or corporation court of the corporation in which * * * such deed or other writing *is,* or *might have been* recorded." Of course the deed was properly recorded in Prince George County and it was not necessary for it to have been recorded in the clerk's office of the corporation court of the City of Hopewell, but as the court properly says: "We know of no rule of law, statutory or otherwise, which prevents the valid subsequent recordation in other counties or cities of a deed once recorded in the given county or city," and as the deed in question "might have been recorded" in the corporation court of the City of Hopewell in contemplation of the law, as it was in fact recorded, and being so recorded at the time the proceedings were instituted, the corporation court of Hopewell had jurisdiction to sustain the motion to appoint a substituted trustee.

The second question was, whether the original trustee in the deed of trust "was a necessary party." Judge Simms, who delivered the opinion of the court, refers to an editorial in the 11th

Volume of the REGISTER, in which we expressed a decided inclination to the opinion that a trustee in an ordinary deed of trust is not interested in the execution of the trust and need not be made a party to or be given notice of the proceeding to substitute a trustee under the statute. Judge Simms at some length very ably shows that in his judgment the original trustee was not interested in the execution of the trust and hence was not a necessary party to, and the statute did not require notice to be given him of the proceedings; but a majority of the court thought otherwise, and Judge Simms did not dissent further than expressing his opinion as we have stated. We think an examination of Judge Simms' opinion will show that the REGISTER was not far out of the way, in the view it took; but of course the law is now settled as far as this state is concerned.

The third question, as to whether Mollie Salisbury was a necessary party to the proceeding was answered in the affirmative, the court holding that the statute had an express requirement that such notice was necessary to *all* the parties interested and that this was made the law by the Code of 1887. That this will cause a good deal of inconvenience there can be no doubt, for parties who now desire to give notice to substitute a trustee will have to examine the title to the property from the date of the recordation of the giving of the trust deed to the time of the giving of the notice.

A very interesting question was raised in the case but the court declined to pass upon it, and this was, whether there was sufficient evidence before the trial judge to support the fact that the original trustee had removed beyond the limits of the State and had declined to accept the trust and act thereunder.